



## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 1150**

**[Document No. AMS-DA-14-0074]**

### **National Dairy Promotion and Research Program; Amendments to the Order**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Dairy Promotion and Research Order (Dairy Order).

The amendment modifies the number of National Dairy Promotion and Research Board (Dairy Board) importer members. The total number of importer members would be reduced from 2 members to 1 member, and the domestic Dairy Board members would remain the same at 36.

The Dairy Order requires that at least once every three years, after the initial appointment of importer members on the Dairy Board, the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years, and, on the basis of that review, if warranted, reapportion the importer representation on the Dairy Board to reflect the proportional shares of the United States market served by domestic production and imported dairy products.

**DATES:** Effective Date: [Insert date of publication in the **Federal Register**].

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**SUPPLEMENTARY INFORMATION:** This final rule is issued pursuant to the Dairy Production Stabilization Act (Dairy Act) of 1983 [7 U.S.C. 4501-4514], as amended.

**Executive Order 12866**

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

**Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not intended to have a retroactive effect. In accordance with 7 U.S.C. 4512(a), this rule will not preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

The Dairy Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under 7 U.S.C. 4509, any person subject to the Dairy Order may file with the Secretary of Agriculture (Secretary) a petition stating that the Dairy Order, any provision of the Dairy Order, or any obligation imposed in connection with the Dairy Order is not in accordance with the law and request a modification of the Dairy Order or to be exempted from the Dairy Order. Such person is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Dairy Act provides that the district court of the United States in any district in which the person is an inhabitant or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

**Regulatory Flexibility Act**

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has

certified that this final rule will not have a significant economic impact on a substantial number of small entities. The purpose of the Regulatory Flexibility Act is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

The Dairy Act authorizes a national program for dairy product promotion, research and nutrition education. Congress found that it is in the public interest to authorize the establishment of an orderly procedure for financing (through assessment on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

The Small Business Administration [13 CFR 121.201] defines such entities with fewer than 500 employees as small businesses. According to 2013 data from the U.S. Census Bureau, 98.6 percent of these types of firms had fewer than 500 employees (<http://census.gov/econ/subs/>). According to the U.S. Customs and Border Protection (CBP), in 2014, approximately 1,400 importers paid assessments under Section 1150.152(b) of the Dairy Order. Although data is not available concerning the sizes of these firms, it is reasonable to assume that most of them would be considered small businesses. The most common classification for dairy product importers is Grocery and Related Product Merchant Wholesalers (North American Industry Classification System, category 4244).

The final rule amends the Dairy Order, Section 1150.131(c), by reducing the number of Dairy Board importer representatives from 2 members to 1 member.

The amendment should not have a significant economic impact on persons subject to the Dairy Order. The changes allow representation on the Dairy Board to better reflect the volume of dairy product imports into the United States.

### **Paperwork Reduction Act**

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. chapter 35], the information collection requirements and record keeping provisions imposed by the Dairy Order have been previously approved by OMB and assigned OMB Control No. 0581-0093. No relevant Federal rules have been identified that duplicate, overlap, or conflict with this rule.

### **Statement of Consideration**

Upon publication of this rule, the Dairy Order is administered by a 37-member Dairy Board, 36 members representing 12 geographic regions within the United States and 1 member representing importers. The Dairy Order requires in Section 1150.131(f) that at least once every three years, after the initial appointment of importer representatives on the Dairy Board, the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years and, on the basis of that review, if warranted, reapportion the importer representation on the Dairy Board to reflect the proportional shares of the United States market served by domestic production and imported dairy products. This reapportionment review is the first conducted since importer members were appointed to the Dairy Board on November 2, 2011.

For initial representation of importers on the Dairy Board, the Dairy Act states “In making initial appointments to the Board of importer representatives, the Secretary shall appoint 2 members who represent importers of dairy products and are subject to assessment under the

order.” 7 U.S.C. 4504(b)(6)(A). For subsequent representation of importers, the Dairy Act goes on to state “At least once every 3 years after the initial appointment of importer representatives under subparagraph (A), the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous 3 years and, on the basis of that review, shall reapportion importer representation on the Board to reflect the proportional share of the United States market by domestic production and imported dairy products.” 7 U.S.C. 4504(b)(6)(B).

Section 1150.131(f) of the Dairy Order states the basis for the comparison of domestic production of dairy products to imported products should be estimated total milk solids. The calculation of total milk solids of imported dairy products for reapportionment purposes “shall be the same as the calculation of total milk solids of imported dairy products for assessment purposes.” The reapportionment review was not conducted prior to 2015 because three full years’ worth of data was not available.

Using National Agricultural Statistical Service (NASS) Annual Dairy Products Summary data, the average U.S. milk total solids for domestic dairy products for 2012 to 2014 was 23,462 billion pounds annually. Based on the total milk solids number, each of the 36 domestic Dairy Board producer members would represent 652 million pounds of total milk solids (23,462 billion pounds divided by 36 producer members equals 652 million pounds per producer).

Using information received from CBP, the average total milk solids imported during 2012 to 2014 was 589 million pounds (589 million pounds divided by 1 importer member equals 589 million pounds per importer).

Accordingly, Table 1 summarizes, based on U.S. total solids and imported total solids, the adopted number of Dairy Board seats for domestic and importer members.

Table 1 – Dairy Board Representation Based on U.S. Total Solids and Imported Total Solids

	<b>Average Total Milk Solids (lbs.)</b>	<b>Adopted Number of Board Seats</b>	<b>Average Total Milk Solids Represented Per Board Member (lbs.)</b>
<b>Domestic Producer</b>	23,461,555,556	36	651,709,877
<b>Importer</b>	589,296,653	1	589,296,653

On April 1, 2016, a proposed rule was published in the **Federal Register** [81 FR 18802] inviting comments on proposed modifications to the number of importer representatives on the Dairy Board. Interested parties were provided 30 days to comment on the proposed amendment. USDA received three timely comments from industry organizations and an individual. Of those comments, two were opposed the rule and one did not address the merits of the proposed rule.

One commenter opposed reducing the number of importer members on the Dairy Board, recognizing that approximately 1,400 importers paid assessments under the Dairy Order in 2014. The commenter stated that due to the limits of the Dairy Tariff-Rate Import Quota Licensing Program placed on the volume of cheese imported into the U.S., increasing import volumes by any appreciable amount is impossible.

A second commenter also opposed the proposal to reduce Dairy Board importer representation from two members to one member, and urged for the withdrawal of the proposed rule. The commenter recognized the Dairy Act requires importer representation to reflect the proportional share of the U.S. market by domestic production and imported dairy products. However, the commenter argued that increasing import volumes by any appreciable amount is impossible due to the limits placed on the volume of cheese imported into the U.S. by factors

beyond the control of the market, namely quotas, tariffs and import licenses. The commenter also stated safeguard triggers require substantially higher tariffs if the triggers are breached and noted this occurred with butter in 2015 and may occur in the coming year with several cheeses. The commenter went on to state that the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) agreements are focused on the reduction, if not elimination of tariffs and quotas. As a result, TPP and TTIP implementation would likely result in an increase in imported dairy products, including cheese, and would make the representation of importers on the Dairy Board even more meaningful.

As noted in the proposed rule, the Dairy Order requires and provides instruction on how to carry out a review to determine whether or not a reapportionment of importer members on the Dairy Board is warranted. Therefore, the proposed rule will not be withdrawn. Neither commenter disputed the method of nor the data used to conduct the reapportionment review. Similarly, an alternative process for conducting the review was not offered. Additionally, because the Secretary is required to review importer representation every three years, any increase in imported dairy products, cheese or otherwise, would be reflected in the calculations used to determine whether importer representation would increase, remain the same, or decrease.

This final rule adopts the proposed rule without change, and therefore Dairy Board importer representation is decreased from two importer members to one importer member.

Pursuant to 5 U.S.C. 553, it is found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the Federal Register because this rule should be in effect as soon as possible to appoint Dairy Board members for the 2016-2019 term.

## **List of Subjects in 7 CFR Part 1150**

Dairy products, Milk, Promotion, Research.

For the reasons set forth in the preamble, 7 CFR part 1150 is amended as follows:

### **PART 1150 - DAIRY PROMOTION PROGRAM**

1. The authority citation for 7 CFR part 1150 continues to read as follows:

Authority: 7 U.S.C. 4501-4514 and 7 U.S.C. 7401

2. In § 1150.131, paragraph (c) is revised to read as follows:

§ 1150.131 Establishment and membership.

\* \* \* \* \*

(c) One member of the board shall be an importer who is subject to assessments under

§ 1150.152(b).

\* \* \* \* \*

Dated: August 8, 2016

Elanor Starmer  
Administrator

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